No. 76-410

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNION NACIONAL DE TRABAJADORES, ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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INDEX

CITATIONS

Cases:

Cases—Continued

Constitution and statutes:

Constitution and statutes—Continued

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 152a-176a) is reported at 540 F. 2d 1. The decisions and orders of the National Labor Relations Board (Pet. App. 9a-151a) are reported at 219 NLRB 405, 414, 429, and 862.

JURISDICTION

The decision of the court of appeals was entered on June 21, 1976 (Pet. App. 153a). The petition for a writ of certiorari was filed on Monday, September

20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board's remedial orders were reasonable and proper.

2. Whether the court of appeals lacked jurisdiction to review the Board's revocation of the Union's certification.

3. Whether the Board's procedure with respect to the use of the Spanish language in hearings conducted in Puerto Rico violates the Fifth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the United States Constitution and of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, as amended, 29 U.S.C. 151, *et seq.*) are set out at pages 2a-7a of the petition. Section 10(e) and (f) of the Act, 29 U.S.C. 160(e) and (f), are set out in Appendix, *infra* at pages 1a-3a.

STATEMENT

During 1973 and 1974 a series of unfair labor practice charges were filed against Union Nacional de Trabajadores ("the Union") and several of its agents alleging a wide range of activities violative of Section 8(b)(1)(A) of the Act, 29 U.S.C. 158(b)(1)(A).[1] Four separate complaints were issued by

[1] In one case, the Union also was charged with violating the secondary boycott provisions of the Act, Section 8(b)(4)(i), (ii)(B), 29 U.S.C. 158(b)(4)(i), (ii)(B) The petition does not concern this charge (Pet. 6, n. 5).

the Regional Director for the National Labor Relations Board; each was tried separately before different Administrative Law Judges of the Board. The hearings were conducted in English; the testimony of non-English speaking witnesses was translated. In each case the Board found that the Union had violated Section 8(b)(1)(A) of the Act and recommended the issuance of a broad remedial order.

Thus, in the *Macal* case,[2] the Board found that the Union, through its agents, had violently assaulted the company's president in his office (Pet. App. 23a); threatened one employee with death (Pet. App. 18a); intimidated four or five other employees who were attempting to work while the Union was striking (Pet. App. 14a-15a, 18a-19a); and threatened an employee because his testimony at the unfair labor practice hearing was detrimental to the Union (Pet. App. 15a). In the *Carborundum* case, the Board found that Union agents had threatened the company's negotiators with physical violence at a collective bargaining session (Pet. App. 33a-36a); entered the plant and beat up a company supervisor and an employee, and had threatened to kill that employee (Pet. App. 36a-41a, 60a); and threatened to break down the company gates (Pet. App. 41a-43a, 61a). In the *Jacobs* case, the Board found that Union agents threatened, assaulted, offered to fight with,

[2] As was the procedure below, the cases will be discussed under the name of the party filing charges against the Union.

and inflicted damage upon the property of three company supervisors (Pet. App. 77a-78a); threatened and assaulted suppliers and persons conducting business with the company during a strike called by the Union; and gathered eight to twelve people armed with pipes and sticks on two separate occasions to prevent employees from working during the strike (Pet. App. 72a-74a). Finally, in the *Merck-Catalytic* case, the Board found that the Union had engaged in mass picketing and blocking tactics to prevent ingress and egress to the Merck-Catalytic premises, including threats to inflict and the actual infliction of physical injury and property damage upon the employees of Catalytic and at least four other employers, for the purpose of compelling employees to honor the Union's picket line and engage in a secondary boycott against Catalytic (Pet. App. 105a-114a).[3]

Based upon these findings, and its prior findings of violent unlawful conduct in *Union Nacional de Trabajadores (Surgical Appliances Mfg. Inc.)*, 203

[3] For 15 days, 39 Merck employees were forced to remain inside of the plant because of the Union's violent tactics and refusal to allow them to leave the plant (Pet. App. 109a). During the strike, several supervisors and plant guards of Merck and Catalytic were threatened with death; suppliers of Catalytic and non-strikers were threatened with and subjected to physical violence and property damage (Pet. App. 105a, 114a); and, when non-striking employees finally formed caravans to protect themselves while crossing the picket line, the Union assembled groups of strikers armed with pipes, clubs, and electrical cable to break up the caravans (Pet. App. 113a-114a).

NLRB 106,[4] the Board issued broad remedial orders requiring the Union and its agents to cease and desist not only from the unfair labor practices found, but also from "in any other manner restraining or coercing employees in the exercise of rights guaranteed in Section 7 of the Act" (Pet. App. 21a, 25a, 65a, 89a-90a, 92a, 95a-96a, 126a, 134a). The Union was also required to post at its offices and meeting places notices prescribed by the Board; to mail signed copies of such notices to the Board's Regional Director, for mailing to the employees of the companies involved; and to place the notices in all newspapers of general distribution published in Puerto Rico (Pet. App. 26a, 65a-66a, 96a, 136a).

In addition to these remedial orders, the Board utilized its decertification authority in response to a petition by the Carborundum company. The Board consolidated the company's petition to revoke the Union's certification for consideration with the unfair labor practice complaint against the Union under Section 8(b)(1)(A) and a Section 8(a)(5) unfair labor practice complaint against Carborundum for refusal to bargain (Pet. App. 58a, n. 1).[5] In its

[4] In that case, the Board found that the Union violated Section 8(b)(1)(A) by throwing stones at non-strikers crossing its picket line and thus blocking their access to the plant; assaulting a non-striker seeking access to the plant; and pouring coffee upon a supervisor and assaulting the company president and his wife.

[5] The Board sustained the Section 8(b)(1)(A) complaint, but dismissed the Section 8(a)(5) complaint (Pet. App. 61a-62a, 66a).

decision in the *Carborundum* case, the Board revoked the Union's certification because the Union "corrupted and frustrated the representative scheme of bargaining envisaged by the Act," making it impossible for it to conduct collective bargaining negotiations on behalf of the employees it represented (Pet. App. 63a-64a). The right to invoke the statutory recognition procedures was withdrawn until "the employees are able to demonstrate their desires anew in an atmosphere free of coercion * * *" (Pet. App. 64a).

The Board moved pursuant to Section 10(e) of the Act, 29 U.S.C. 160(e), to obtain court of appeals enforcement of its remedial orders in the unfair labor practice proceedings. However, the Union did not file a petition for appellate review under Section 10 (f), 29 U.S.C. 160(f), of the dismissal of the refusal to bargain complaint against Carborundum.

With one minor modification (Pet. App. 152a-176a),[6] the court of appeals enforced the Board's orders. The court held that "the imposition of these broad orders was entirely proper under the circumstances" (Pet. App. 166a). It explained (*id.* at 166a-167a):

> It is well established that, when a record discloses persistent attempts to interfere with legislatively protected rights by varying methods, the Board may restrain a labor organization from committing similar or related unlawful acts in

[6] The court (one judge dissenting) found that the Union's assertion in *Carborundum* that it would break down the company's gates was, in context, not threatening (Pet. App. 165a).

> the future. The record in these cases amply supports the Board's conclusions that the Union has demonstrated a proclivity to violate the § 7 right of employees. The Union not only has been found to have committed numerous violations of § 8(b)(1)(A) in five separate cases. Its agents have stated, both in the course of their unlawful activities and in the hearings before the Board, that they do not regard themselves as subject to the authority of the Act and that they feel no obligation to conform their conduct to its requirements. [Footnotes and citations omitted.]

The court further approved the Board's mailing and publication requirements. It pointed out that, since many of the victims of the unlawful Union activities were not Union members, merely ordering that copies of the notices be posted at the Union offices and meeting places "would plainly be inadequate" (Pet. App. 167a). Similarly, the court stated that where, as here, "the violations are flagrant and repeated," newspaper publication would not only assure adequate notice but also neutralize the effects of "persistant illegal activity" (*id.* at 167a-168a).

Petitioners attempted to use the appellate proceeding seeking enforcement of the Board's remedial orders to challenge the Board's action in revoking the Union's certification; however, the court held that it had no jurisdiction to review the Board's decertification order (Pet. App. 168a). The court of appeals noted that petitioners had not yet utilized the possible avenue for review provided by a Section 8(a)(5) complaint and a Section 10(f) petition for

review and that the decertification order was not a predicate for any of the remedial orders for which enforcement was sought. Citing *American Federation of Labor* v. *National Labor Relations Board*, 308 U.S. 401, the court explained that, "since the decertification order did not serve as the predicate for any of the final orders we review today, we are presently without jurisdiction to review the revocation of the Union's" certification (Pet. App. 169a).

ARGUMENT

1. Section 10(c) of the Act, 29 U.S.C. 160(c), empowers the Board, upon finding that an unfair labor practice has been committed, to order the violator to cease and desist and "to take such affirmative action * * * as will effectuate the policies of [the] Act." In *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 433, this Court held that Section 10(c) of the Act does not confer on the Board general authority to restrain unlawful practices which it has not yet found to have occurred. However, where past unlawful conduct raises the danger of future violations, effective preventive orders are proper. The Court stated (*id.* at 436-437):

> The breadth of the order * * * must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed * * * in the past. * * * To justify an order

> restraining other violations it must appear that * * * danger of their commission in the future is to be anticipated from the course of [unlawful] conduct in the past.

The courts of appeals, accordingly, have held that Board orders are properly drawn to prohibit the charged party from "in any other manner" restraining or coercing employees in the exercise of their statutory rights where that party has demonstrated "a proclivity to violate the Act" (*Southwire Company* v. *National Labor Relations Board*, 383 F. 2d 235, 237 (C.A. 5)), or where it has "an attitude of opposition to the purposes of the Act generally" (*National Labor Relations Board* v. *Moore Dry Kiln Co.*, 320 F. 2d 30, 35 (C.A. 5)). See also *Allegheny Pepsi-Cola Bottling Co.* v. *National Labor Relations Board*, 312 F. 2d 529, 532 (C.A. 3); *Central Mercedita, Inc.* v. *National Labor Relations Board*, 288 F. 2d 809, 812 (C.A. 1). Similarly, orders restraining violations directed at employees of other than the named employers are appropriate where the facts show an intention to direct an unlawful campaign more broadly than just at the immediately involved employers. See, *e.g.*, *National Labor Relations Board* v. *Local 25, I.B.E.W.*, 383 F. 2d 449, 454-455 (C.A. 2).

Under these principles, the Board's orders here were entirely justified.[7] As the court below noted

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[7] Petitioners assert (Pet. 34-36) that a respondent is entitled to notice that the Board's General Counsel intends to seek broad remedial orders. Petitioners were aware from the complaints that they were charged with widespread miscon-

(Pet. App. 166a-167a), Union agents, in the course of committing illegal acts and later at the Board hearings, expressed their intention to continue to engage in such illegal conduct, regardless of what injunctions or restraining orders were placed upon the Union or them. Moreover, in five separate unfair labor practice proceedings, the Union was found to have engaged in a campaign of violence and harassment to achieve its ends which included blocking ingress and egress to and from struck plants; mass picketing; and threatening and actually committing physical violence, property damage, and other reprisals against management officials, supervisors, and employees of the struck companies. Such conduct fully supports the Board's factual findings, upheld by the court below, that there was reason to believe that the Union intended to continue its unlawful conduct.[8]

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duct. Moreover, they were aware during the hearings that the General Counsel and/or the charging parties sought extraordinary remedial relief. See Pet. App. 101a-102a, 120a-121a; *Carborundum* Tr. 12-13, 251-253, 256-260; *Jacobs* Tr. 194; *Macal* Tr. 74-81, 175, 179-184.

[8] Thus, contrary to petitioners' claim, there was obviously more in this record than a mere finding that the Union had engaged in "similar conduct" (Pet. 32). Accordingly, this case differs significantly from *San Francisco Local Joint Exec. Bd. of Culinary Wkrs.* v. *National Labor Relations Board*, 501 F. 2d 794, 801-802 (C.A. D.C.), on which petitioners rely (Pet. 27-33). There the court, in a case involving picketing in violation of Section 8(b)(7)(C), 29 U.S.C. 158(b)(7)(C), struck down an order which prohibited picketing directed at

Petitioners claim that the Board's order implicates First Amendment values because it was based on the Union's opposition to the Board's jurisdiction (Pet. 43-45) and because its broad language chills their future rights to organize (Pet. 37-42). Neither claim has factual support. The credited evidence does not show that the Union's refusal to obey the law was based upon a belief that the Board lacks authority in Puerto Rico, but rather on its belief that "the laws * * * in this country [should] be applied in a manner favorable to the workers and when they cannot be they should be violated" (Pet. App. 63a, n. 6, 87a-88a). More importantly, the remedial order was not founded upon the expression of opposition to Board jurisdiction, but rather on the history of violent conduct and the clear intention not to obey the law. Petitioners' overbreath argument is similarly unpersuasive. The order merely tracks the language of Section 8(b)(1)(A) of the Act in prohibiting petitioners from "restrain[ing] or coerc[ing] employees in the exercise of the rights guaranteed in section 7 of the Act." The fact that the order prohibits not only the unlawful acts which have occurred but violations of the Section 7 guarantees "in any other manner" adds nothing to the simple prohibition against violating the Act. Petitioners' complaint is merely that it would "be broad enough to cover any

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employers other than the employers immediately involved. The court found no substantial evidence to support the Board's view that the union's conduct demonstrated a " 'generalized scheme' to violate the Act." As shown, there is substantial evidence of such an intent here.

possible violation of Section 8(b)(1)(A) which might occur in the future" (Pet. 37). In the absence of a claim, not made here, that the language of Section 8(b)(1)(A) of the Act is itself unconstitutionally vague, there is no basis for challenging the constitutional validity of the remedial order.

Nor is there merit to petitioners' objections (Pet. 46-48) to the Board's mailing and publication requirements. The courts have recognized that requiring communication to employees of the contents of Board notices by means other than posting at the plant or the union's offices is appropriate if necessary to eliminate the coercive impact of unfair labor practices.[9] As the court below noted (Pet. App. 167a), such means were particularly appropriate here, "where many of the victims of the unlawful Union activities were not Union members * * *." "Moreover, where the violations are flagrant and repeated, the publication order * * * [lets] in 'a warming wind of information and * * * reassurance'" (Pet. App. 167a-168a).

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[9] *Local 294, Teamsters* v. *National Labor Relations Board*, 506 F. 2d 1321 (C.A. D.C.), enforcing 203 NLRB 253, 257; *Local 294, Teamsters* v. *National Labor Relations Board*, 506 F. 2d 1321 (C.A. D.C.), enforcing 204 NLRB 700, 708; *Textile Workers Union* v. *National Labor Relations Board*, 388 F. 2d 896, 903-905 (C.A. 2), certiorari denied *sub nom. J. P. Stevens & Co., Inc.* v. *National Labor Relations Board*, 393 U.S. 836; *International Union of Operating Engineers, Local No. 825*, 173 NLRB 955, n. 1, enforced, 420 F. 2d 961 (C.A. 3); *J. P. Stevens Co., Inc.* v. *National Labor Relations Board*, 461 F. 2d 490, 495 (C.A. 4); *Texas Gulf Sulphur Co.* v. *National Labor Relations Board*, 463 F. 2d 778, 779 (C.A. 5).

2. The court of appeals correctly determined that a petition for enforcement of remedies for unfair labor practices did not provide it with jurisdiction to review the Board's decision to revoke the Union's certification.[10] In *American Federation of Labor* v. *National Labor Relations Board*, 308 U.S. 401, this Court held that the jurisdictional grant in Section 10(e) and (f) of the Act does not authorize review of a Section 9 certification proceeding by a court of appeals; "Congress, as the result of a deliberate choice of conflicting policies, has excluded representation certifications of the Board from the review by federal appellate courts * * *" (*id.* at 411). The rationale of that decision applies equally to decertifications. Reviewing the entire structure of the Act, this Court stated, "[t]he statute on its face thus indicates a purpose to limit the review afforded by [Section] 10 to orders of the Board prohibiting unfair labor practices, a purpose and a construction which its legislative history confirms" (308 U.S. at 409). Certification issues can become reviewable by

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[10] In September 1974, the Carborundum company filed the unfair labor practice charges on which the Section 8(b)(1)(A) complaint in *Carborundum* was based (Pet. App. 30a) as well as a petition to revoke the Union's certification. The Regional Director denied the petition and the Board rejected the Company's request for review without prejudice to renewal of the request before the Administrative Law Judge in the unfair labor practice proceeding (Pet. App. 33a). The Administrative Law Judge subsequently denied the renewed petition to revoke the certification (Pet. App. 49a). Upon exceptions to that determination, the Board reversed the Law Judge (Pet. App. 62a).

the courts of appeals only if and when they form the basis of an unfair labor practice finding and order. *Id.* at 409-412; *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 476-477; Section 9(d) of the Act, 29 U.S.C. 159 (d).[11] They do not become reviewable in the courts of appeals merely because they are consolidated for hearing and decision in a related unfair labor practice proceeding for which enforcement of remedial orders is sought in the court of appeals under Section 10(e) of the Act. The presence of consolidation procedures designed for the efficient processing of related factual claims does not provide a sufficient rationale for frustrating the congressional design that certification determinations not be directly reviewable.[12]

The cases cited by petitioners (Pet. 18-19) involving review of orders requiring the disestablishment of a labor organization found to be employer-domi-

[11] Petitioners did not seek review of the Board's dismissal of the refusal to bargain complaint issued against Carborundum. The court of appeals, although expressing doubt, left open the possibility that, had petitioners done so, or should they do so in the future, this would afford a sufficient basis for obtaining review of the revoked certification (Pet. App. 169a-170a).

[12] Moreover, while, as petitioners point out (Pet. 15), the federal district courts possess limited jurisdiction to review representation determinations where the Board has acted "in excess of its delegated powers and contrary to a specific prohibition in the Act" (*Leedom* v. *Kyne*, 358 U.S. 184, 188), this power does not enlarge the jurisdiction of the courts of appeals directly to review Board representation determinations.

nated, in violation of Section 8(a)(2) of the Act, 29 U.S.C. 158(a)(2), are inapposite. In those cases, disestablishment was a remedy for an unfair labor practice. But, as the Board noted in *Hughes Tool Co.*, 104 NLRB 318, 323-324, the unfair labor practice procedures are separate and distinct from the revocation of certification procedures; the only issue in a revocation of certification proceeding is "whether or not the conduct [of the union] is incompatible with the status and obligations of a certified bargaining representative" (*id.* at 323).

3. There is no merit in petitioners' contention that the conduct of the Board proceedings in English denied them their constitutional rights to due process and equal protection (Pet. 21-26). The Board's procedure tracks that of the United States District Court for the District of Puerto Rico, which is statutorily mandated and has been judicially approved.[13] See *United States* v. *DeJesus Boria*, 518 F. 2d 368, 370-371 (C.A. 1); cf. *Carmona* v. *Sheffield*, 475 F. 2d 738 (C.A. 9). Petitioners do not claim that they were denied the opportunity to employ their own translators, or that they are indigent and unable to

[13] This is true even though, in contrast to the Board hearings, the parties before the district court may be individual citizens rather than corporate or union organizations. 48 U.S.C. 864 provides in pertinent part: "All pleadings and proceedings in the United States District Court for the District of Puerto Rico shall be conducted in the English language." The asserted presence of bilingual judges in the district court (Pet. 26) obviously does not change the inability of Spanish speaking parties to understand testimony given in English.

do so. Petitioners complain only that, in a non-criminal proceeding, the Board did not conduct the proceedings in Spanish or provide a translator at the Board's cost to the Union. Petitioners have not demonstrated how they were prejudiced by the Board's failure to provide a translation of the testimony of English-speaking witnesses into Spanish (cf. Pet. 21);[14] during the hearing petitioners never requested such translation. Indeed, most of the witnesses testified in Spanish.[15]

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[14] The Board, however, did "utilize translators whenever a witness did not understand or speak English well enough to testify in English" (Pet. App. 155a, n. 3).

[15] In *Macal*, apart from one witness called by the Union itself and one witness called by the General Counsel simply to identify the Union's agents, only one witness testified in English. In *Carborundum*, apart from two witnesses called by the Company in its own defense against a refusal to bargain complaint, only one witness testified in English. In *Merck-Catalytic*, the Union failed to appear at the hearing after its proposed settlement agreement was rejected by the Administrative Law Judge (Pet. App. 161a-162a). In *Jacobs* only one witness testified in English.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1976.

APPENDIX

Section 10(e) and (f) of the Act, 61 Stat. 147, 148, as amended, 29 U.S.C. 160(e) and (f), provides:

> (e) Petition to court for enforcement of order; proceedings; review of judgment.
>
> The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on

the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(f) Review of final order of Board on petition to court.

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such

order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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